United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7139

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE CITY OF ROCHESTER, Individually, and on behalf of Donald Bunch; and DONALD BUNCH, Individually and on behalf of all others similarly situated,

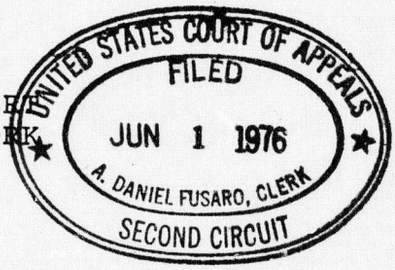
Plaintiffs-Appellants,

-vs-

THE MONROE COUNTY CIVIL SERVICE COMMISSION consisting of GERALD B. HANNA, MICHAEL D. CERAME, JOSEPH T. DEVITT, ROBERT B. NELLIS and GEORGE H. SCHEIBLE, Commissioners, and its Executive Director, FREDERICK W. LAPPLE,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK



APPELLANT'S BRIEF

LOUIS N. KASH, Esq.
Corporation Counsel of the
City of Rochester
Attorney for Plaintiffs-Appellannts
46 City Hall
Rochester, New York 14614
Telephone: (716) 428-6986

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STATEMENT OF ISSUE PRESENTED

Should the District Court's Decision and Order, insofar as it denied plaintiffs' application for a preliminary injunction, be reversed, and a preliminary injunction be granted?

STATEMENT OF THE CASE

This is an action for a declaratory judgment and a permanent injunction, in which the plaintiffs are claiming that Section 61 of the New York Civil Service Law, as applied, is violative of the 14th Amendment to the Federal Constitution and obstructive of the implementation of the Civil Rights Act of 1870 (42 U.S.C. Section 1981), the Civil Rights Act of 1871 (42 U.S.C. Section 1983), and Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (42 U.S.C. Section 2000-e et seq.). Thus, the action arises under the Constitution and statutes of the United States.

Jurisdiction is predicated on 28 U.S.C. Section 1343. Plaintiff City of Rochester has standing by virtue of 28 U.S.C. Sections 2201 and 2202 (the Declaratory Judgment Act); plaintiff Bunch has standing by virtue of 42 U.S.C. Sections 1981 and 1983.

The City of Rochester is a Municipal Corporation and a public employer. Donald Bunch is a black man in his forties who has been employed by the City's Department of Parks and Recreation in various positions and capacities for many years. In early 1974, a vacancy occurred in the position of recreation sector leader. As explained in paragraph 2 of the affidavit of Jeffrey Swain, Commissioner of Parks and Recreation, the position of recreation leader is an important and sensitive full-time supervisory job; there are only four such positions in the City.

An individual may be appointed to a vacant position ona "provisional" basis according to §65 of the Civil Service Law.

A provisional appointment is not a permanent appointment, but lasts only until the establishment of a list of persons eligible for permanent appointment to the position as a result of their having passed a competitive examination designed to measure merit and fitness.

Mr. Bunch was appointed to the vacant position of recreation sector leader on a provisional basis. It is undisputed that he has served effectively in that capacity for approximately one and one-half years.

In due course, the Monroe County Civil Service Commission administered and graded a written examination for the position of recreation sector leader. Mr. Bunch took and passed the exam. All those who passed the exam were ranked in order of their final scores on the exam, and were placed on a list of three eligible for permanent appointment to the position. Mr. Bunch was ranked number 17, out of 19 persons who passed the exam.

By letter dated June 20, 1975, the City's Personnel Director, Paul Brayer, requested the Civil Service Commission to certify Mr. Bunch as eligible for permanent appointment to the position of recreation sector leader. Mr. Brayer stated the basis of his request as follows:

> "...Mr. Bunch is a member of a minority group, and the only such member to take and pass the exam for this position. Pursuant to federal guidelines the City of Rochester has formally established a written affirmative action plan with stated goals for the employment of minority group members and women in municipal service. The permanent appointment of Mr. Bunch to this position would clearly be in furtherance of this plan and these goals."

On the same date, the Civil Service Commission replied to Mr. Brayer by denying his request on the ground that §61 of the New York State Civil Service Law restricts certification for permanent appointment to the three highest scoring persons who passed the exam and that Mr. Bunch was not listed among the top three. The relevant language of §61 reads as follows:

> ".....Appointment or promotion from an eligible list to a position...shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list ..."

The City is subject to the provisions of Title VII of the U.S. Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, and the regulation and guidelines promulgated thereunder. These laws not only prohibit racial discrimination in employment policies, practices and procedures, but also encourage the establishment of employer affirmative action plans designed to foster the recruitment, hiring and promotion of members of minority groups. The City of Rochester has duly established such an Affirmative Action Plan which is attached to the complaint.

The preliminary statistics submitted by the City in the affidavit of Personnel Director Paul W. Brayer and Affirmative Action Officer H. Brent Matthewson demonstrate that many minority group members who take and pass civil service exam for higher level

positions in the Department of Parks and Recreation do not place in the top three examinees and thus do not receive permanent appointments. Thus, as the statistics also demonstrate, very few minority group members have achieved permanent status in higher level jobs in the Department. At the trial of this action the plaintiffs will introduce a great deal more statistical evidence demonstrating these employment patterns. However, until the action is tried and a decision rendered, the plaintiffs seek a preliminary injunction designed to allow Mr. Bunch to continue serving as a recreation sector leader on a merely provisional basis as he had done for one and one-half years.

This action was commenced on July 3, 1975, by the filing of the complaint with the United States District Court for the Western District of New York. Also on July 3, 1975, Hon. Harold P. Burke signed an order to show cause ordering the defendants to show cause why a preliminary injunction should not issue. The order was returnable at Rochester, New York on July 14, 1976, at which time the parties appeared by counsel and presented oral arguments to the court. The parties have also submitted affidavits and briefs to the court.

By decision and order dated February 11, 1976, and entered on February 13, 1976, Judge Burke, inter alie, denied plaintiffs' application for a preliminary injunction.

POINT I

A COURT OF APPEALS IS AUTHORIZED TO REVERSE A DISTRICT COURT'S DENIAL OF A PRELIMINARY INJUNCTION.

This court has jurisdiction to entertain the district court's denial of a preliminary injunction pursuant to 28 U.S.C.A §1292. This court should overturn the district court's denial of a preliminary injunction because the district court did not apply the proper standards for granting injunctive relief. As will be shown in Point I, which outlines standards which this court should apply in reviewing the district court's decision, and in Point II which applies the rules to the factual situation present in the instant case, the district court erred in denying the preliminary injunction.

Point I discusses this court's jurisdiction to hear the instant case, then outlines the rules which apply in the court's review of the district court's decision.

JURISDICTION

Jurisdiction to hear this interlocutory appeal from the district court's denial of a preliminary injunction is based upon the jurisdiction conferred by 28 U.S.C.A §1292, which states:

> "Interlocutory decisions.
>
> (a) The courts of appeal have jurisdiction from:
>
> (1) interlocutory orders of the districts of the United States . . .or of judges thereof, granting, continuing, modifying, refusing or dissolving

injunctions,...except where a direct review may be had in the Supreme Court; . . . ."

The instant case involves an appeal from the denial of a preliminary injunction by the District Court for the Western District of New York, and is clearly within the jurisdiction of this court, as such jurisdiction is conferred by 28 U.S.C.A §1292. Therefore, this discussion should proceed to a consideration of the laws which apply to this court's review of the district court's denial of a preliminary injunction .

RULES FOR APPELLATE REVIEW OF DISTRICT COURT'S DECISION GRANTING OR DENYING A PRELIMINARY INJUNCTION.

This court's review of the district court's decision is predicated upon two factors:

(1) The scope of the appellate court's review;

(2) The rules which apply to the granting of a preliminary injunction.

These factors shall be discussed in order. The general rule is stated that the findings of the district judge "are not to be disturbed unless found to be clearly erroneous." Dopp v. Franklin National Bank, 461 F.2d 873, 879 (2d Cir. 1972). It has been stated that a district court's grant or denial of a preliminary injunction will not be overturned unless the district judge has erroneously applied the law or has abused his discretion in his application of the law. See American Federation of Musicians

V. Stein, 213 F. 2d 679 (6th Cir. 1974). "But Congress would scarcely have made orders granting or refusing temporary injunctions as an exception to the general requirement of finality as a condition to appealability, 28 U.S.C.A §1292 (A) (1), if it intended appellate courts to be mere rubber-stamp save for the rare cases when a district judge has misunderstood the law or transcended the boundaries of reason." Omega Importing Corp. v.Petri - Kine Camera Co., 451 F.2d 1190 2d Cir. 1971.

Thus, the Omega court has stated a standard which has been frequently applied where appellate courts are requested to review the granting or refusing of a preliminary injunction by a district court. In Omega the district court denied a preliminary injunction on the basis that the plaintiff showed insufficient likelihood of success in the trial on the merits and that the plaintiff was not threatened with irreparable injury. Chief Judge Friendly, speaking for the Second Circuit, accepted the findings of fact of the district court, but reviewed the lower court's application of the law to such facts in the same manner that it would review the final decision on the merits.

The appellate court recognized that it was obligated to accept the district court's assessment of the credibility of the witness. See Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc. 450 F.2d 271, 274 (2d Cir. 1971).

The appellate court must also give proper regard to the district court's finding of facts and even for the district court's "feel" of the case. 451 F.2d at 1197. However, the court of appeals should not passively accept a district court's decision to deny an injunction where the district court has failed to sufficiently interpret either the law or the facts in such denial See also Mullis v. Arco Petroleum Association, 502 F.2d 1290,7 Cir. 1944.

In the instant case, the district judge made no findings of fact except that the plaintiffs did not show any likelihood of success in the main action and that the plaintiffs would not be irreparably harmed by the denial of a preliminary injunction. Although a hearing was held to consider the preliminary injunction , the facts of the case are not seriously in dispute and the testimony was largely a reflection of the affidavits presented to this court. Therefore, this court would be justified in carefully scrutinizing the record and making its own decision as to the merits of the plaintiffs' request for a preliminary injunction. Before the facts can be applied to determine whether a preliminary injunction should be granted on this appeal, the rules that determine whether a temporary injunction should be granted must be discussed.

Two tests have been formulated for determining whether a preliminary injunction should be granted. The first test requires that the party requesting the preliminary injunction must present (1) probability of success upon a trial on the merits, and (2) the

likelihood of irreparable injury, unless an injunction is granted. Cohen v. Price Commission, 337 F.Supp 1236, 1239 (S.D.N.Y. 1972). The second test , which is the test upon which the plaintiffs rely and upon which relief should be granted, states that a preliminary injunction will issue if the party requesting the injunction raises substantial and difficult issues meriting further inquiry and the harm to him outweights the injury to others if it is denied. Id. See Omega Importing Corporation v. Petri Camera Company, supra; Semmes Motors, Inc. v. Ford Motor Co. 429 F.2d 1197, 1205-1206 (2d Cir. 1970).

The second rule relates closely to the purpose of a preliminary injunction, which is to preserve the existing status of the parties until their rights can be fairly and fully investigated and determined by a trial on the merits. For many years courts have been willing to interfere and to preserve property or the rights of the parties in the status quo during the pendency of a suit without expressing and often without having the means of forming any opinion as to the parties' respective rights. American Federation of Musicians v. Stein, Supra at 682. Thus, instead of requiring the party requesting a temporary injunction to show probable success on the merits, the court should grant an injunction where upon pleadings and the evidence, the case appears to be the proper subject of further litigation.

In Brandeis Machinery and Supply Corporation v. Barber-Greene Company, 503 F.2d 503, (F.6th Cir. 1974), the court stated that "in determining whether sufficient likelihood of success exists as one of the necessary conditions to preliminary injunctive relief, the trial court was required to 'satisfy itself not that the plaintiff certainly has a right, but that he has a fair question to raise as to the existence of such right' American Federation of Musicians v. Stein, 213 F.2d 679, 683, (6 Cir. 1954), Cert. denied, 348 U.S. 873 . . .1954)." Where, then, a substantial dispute exists in either the law or the facts, that will require a trial on the merits to determine the rights of the parties the"substantial and difficult question" portion of the second test has been met.

This has been more clearly discussed in the Omega case, supra, In Omega two camera importers litigated their respective rights to use the trademark "Exakta". The importers of the East German Exakta Cameras requested a preliminary injunction preventing the importer of the West German Exakta Camera from selling its camera in the United States. The district court denied the preliminary injunction. On appeal Judge Friendly discussed the merits of the importer of the East German camera's case. The court recognized that the importer of the West German Exakta probably had a more legitimate claim to the name "Exakta". Nonethe less, the circuit court reversed the district court and granted the injunction because a substantial question remained as to the East German camera importer's claim and such importer would be

harmed if the injunction did not issue. The Omega court, as well as others, are quite helpful in determining what constitutes irreparable injury or substantial harm sufficient to grant an injunction.

The test in Omega is whether the balance of hardships "tips decidedly" in the favor of the person requesting the injunction. The Omega court found that irreparable harm would result if an injunction were no issued because the injury to the movant would not be fully compensation in damages. 451 F.2d at 1195. The court also found that the importer of the West German camera sould not be seriously harmed by the delay caused by the imposition of an injunction preventing its selling cameras in the United States during the pendency and trial. However, the hardships in this case were not so clearly upon the lone shoulders of the importer of the East German cameras that no hardship would result to the other party by the imposition of the temporary injunction.

The courts have indicated that irreparable harm is present where the party seeking an injunction is threatened with a loss of employment and with a loss of his business enterprise. See e.g., Semmes Motors, Inc. v. Ford Motor Co., supra. In a case nearly idential in its facts to the instant case, the court stated that failure to permit the person requesting a temporary injunction to remain in his post on the board of examiners would constitute irreparable injury. The court noted that such injury arises

because the plaintiffs professional reputation would be seriously damaged and, even if he later prevailed, the position which he sought to maintain would not be open to him. King v. Civil Service Commission , 7 F.E.P. 348 (S.D.N.Y. 1973). The court further stated that the defendant would suffer very little by the imposition of the injunction.

As will be more fully stated in Point II, the plaintiffs in the instant case are threatened with irreparable injury unless a temporary injunction is issued and the plaintiffs have raised serious questions meriting further consideration by the district court.

POINT II.

THE DISTRICT COURT ERRED IN ITS DENIAL OF THE PRELIMINARY INJUNCTION

In this Circuit, the standard which governs the granting of a motion for interlocutory relief requires the moving party to demonstrate "either a combination of probable success on the merits and the possibility of irreparable injury or that they [have] raised serious questions going to the merits and that the balance of hardship [tips] sharply in their favor." Stark v. New York Stock Exchange, Inc., 466 F.2d 743, 744 (2d Cir. 1972). (Emphasis added). Accord, Pride v. Community School Board, 482 F.2d 257 (2d Cir. 1973). Plaintiffs submit that under either of these alternative tests they are entitled to interlocutory relief which will allow plaintiff Bunch to remain in the position of recreation sector leader pending final determination of the merits of this action.

A clear application of this Circuit's standards is found in King v. Civil Service Commission, 7 F.E.P. Cases 348 (S.D.N.Y. 1973). This case involved a lawsuit by minority group plaintiffs against the Civil Service Commission of the City of New York and others in which the plaintiffs alleged that certain testing procedures had an unlawful discriminatory impact on minority group members. The King case has many basic similarities to the instant case.

In King, the plaintiff sought injunctive relief to restrain the issuance of an eligibility list of examinees who had passed a civil service examination including a preliminary injunction against any permanent appointments from such a list until a decision was made on the merits of the allegations of discriminatory impact of the tests. One of the plaintiffs, King, had been serving effectively in a position on a provisional basis for some time. King had taken the examination and had failed. He sought the preliminary injunction so that he would not be ousted from his position until there was an opportunity to litigate the merits.

The plaintiffs submitted statistics tending to support their claims of discrimination in the testing procedures of the defendants. In discussing the import of statistics the Court stated, at 7 F.E.D. Cases 352:

> While a mere discrepancy between a minority community population and employment population may not of itself be sufficient to establish a prima facie case of discrimination, our Court of Appeals has recognized that it does invite inquiry, Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission, 482 F.2d 1333, 1335 N.Y. (2d Cir. 1973), and other courts have found it sufficient to establish a prima facie case.

The statistics demonstrated that very few blacks had ever been appointed to the position in question and that historically a disproportionate number of blacks who took the exam for the position failed to pass. On the basis of these facts, the Court

granted the preliminary injunction. The Court found, at 7 F.E.P. Cases 352:

> The evidence before the court does indicate a strong likelihood that the prerequisites and examination and selection procedures for a position on the Board of Examiners have disadvantaged minorities to a "significant and substantial degree." Chance v. Board of Examiners, 458 F. 2d 1167, 1175 (2d Cir. 1972), aff'g. 330 F.Supp. 203, 223 (S.D.N.Y. 1971).

As in King, the plaintiffs herein submitted statistics to the District Court tending strongly to demonstrate their claim that Section 61(1) of the Civil Service Law operates to preclude a disproportionately high number of minority group members from permanent appointment to positions of public employment with the City of Rochester. (See affidavit of Paul W. Brayer and H. Brent Matthewson, Appendix, pp. 48-50.) It has been held repeatedly that such statistics constitute strong evidence of discriminatory practices (U.S. v. Iron Workers Local 86, 443 F.2d 544 (9th Cir., 1971); U.S. v. Hayes International Corp., 456 F.2d 112 (5th Cir., 1972); U.S. v. Brotherhood of Carpenters and Joiners, Local 169, 457 F.2d 210 (7th Cir., 1972)), and that such statistics make out a prima facie case of discrimination (Carter v. Gallagher, 452 F.2d 315 (8th Cir., 1972)). The defendants have utterly failed to rebut these statistics in any way. These statistics establish the likelihood of probable success on the merits. As the Supreme

Court has stated in Griggs v. Duke Power Co., 401 U.S. 424, 431: The Act[1] proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation."

With regard to the possibility of irreparable injury, clearly plaintiff Bunch will suffer such if a preliminary injunction is not issued permitting him to retain his recreation sector leader position on a provisional basis until this matter is tried and decided. If the City of Rochester is forced to appoint someone else to Mr. Bunch's position on a permanent basis then there will be no position for Mr. Bunch even if he wins the lawsuit. This is precisely the same situation as in the King case wherein the Court said, at 7 F.E.P. Cases 355:

> Moreover, it is clear that if preliminary relief is not granted the plaintiffs will suffer irreparable injury.
>
> If a list is issued and individuals are appointed pursuant to that list, plaintiffs, if their allegations by true, could suffer a continued denial of their constitutional rights. Any appointment would have the effect of denying Dr. King his present post....Since appointments to the Board of Examiners are for lifetime tenure, it could be many years before another examination is given, thus effectively mooting whatever claims plaintiffs may possess.

1. Civil Rights Act of 1964, Title VII; 42 U.S.C. §2000-e et. seq.

The plaintiffs contend that their entitlement to interlocutory relief is equally compelling under the alternative standard promulgated in this Circuit. See, Stark v. New York Stock Exchange, Inc., supra. This standard requires applicants for a preliminary injunction to show that they have raised serious questions going to the merits and that the balance of hardship tips sharply in their favor. Even if this Court should agree with Judge Burke that the plaintiffs failed to demonstrate their probability of ultimate success on the merits, this does not obviate the necessity of evaluating the plaintiffs' application under this alternative standard. As was pointed out by the Court in Cohen v. Price Commission, supra, 337 F.Supp. at 1239, a plaintiff is entitled to a preliminary injunction "if his showing of probable success is limited but he raises substantial and difficult issues meriting further inquiry, [and] that the harm to him outweighs the injury to others if it is denied."

Plaintiff Bunch claims that Section 61(1) of the Civil Service Law, as applied to him and to other minority group members, violates the 14th Amendment to the Constitution and several Federal Civil Rights Acts. Specifically, plaintiff Bunch contends that Section 61(1) constitutes an employment policy and practice which, although neutral in intent and impartially administered, has the effect of excluding most minority group members from higher level positions of public employment in the City of Rochester. In other words,

Section 61(1) is an artificial, arbitrary and unnecessary barrier to public employment because it operates to discriminate on the basis of race and cannot be justified by a compelling business necessity. This is precisely the issue with which the United States Supreme Court was concerned in Griggs v. Duke Power Co., supra. Clearly, plaintiff Bunch's claim is not frivolous and "raises substantial and difficult issues meriting further inquiry".

Moreover, unless the requested interlocutory relief is granted, the position of recreation sector leader may be filled by a permanent appointee. This will result not only in the permanent loss of pay, but, more importantly, in the inability of plaintiff Bunch to obtain effective relief and regain his position if he ultimately succeeds on the merits.

Equally clear is the absence of any harm whatsoever to the defendants if interlocutory relief is granted and plaintiff Bunch is permitted to occupy the recreation sector leader position on a provisional basis. Since plaintiff Bunch has passed the examination for recreation sector leader, he has demonstrated, by defendants' own standards, that he possesses the necessary merit and fitness for the job. The Civil Service Commission cannot point to any harm which might be felt if plaintiff Bunch continues in this position during this litigation.

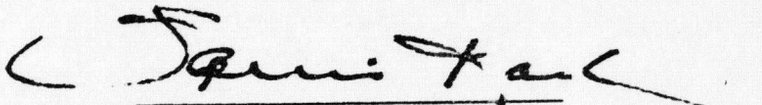
In these circumstances, the balance of hardship tips in only one direction -- in favor of plaintiff Bunch -- and interlocutory relief is both necessary and proper to preserve the status quo and ensure that plaintiff Bunch will be able to obtain effective relief if he succeeds on the merits.

CONCLUSION

The decision and order of the District Court should be reversed, insofar as it denies plaintiffs application for a preliminary injunction, and a preliminary injunction be granted.

Dated: May 28, 1976
Rochester, New York

Respectfully submitted,

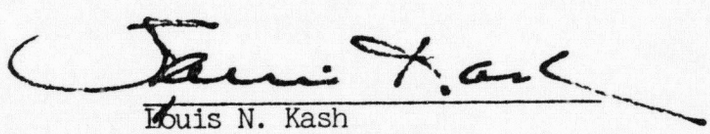


Louis N. Kash, Esq.
CORPORATION COUNSEL
OF THE CITY OF ROCHESTER
Attorney for Plaintiffs-Appellants
46 City Hall
Rochester, New York 14614
Telephone: (716) 428-6986

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May, 1976, I served the foregoing Appellants' Brief upon counsel for the Appellees, by causing two copies to be mailed, postage prepaid, to:

Joseph C. Pilato, Esq.
Deputy County Attorney
307 County Office Building
Rochester, New York 14614



Louis N. Kash
CORPORATION COUNSEL

Dated: May 28, 1976

tence to fill a newly created position, and its action is not subject to judicial review except in case of fraud, bad faith, illegality or arbitrariness. Tjersland v. Brennan, 1953, 124 N.Y.S.2d 333, affirmed 283 App.Div. 694, 1[illegible]3 N.Y.S.2d 532, affirmed 308 N.Y. 838, 126 N.E.2d 177.

§ 61. Appointment and promotion

1. Appointment or promotion from eligible lists. Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list who are willing to accept such appointment or promotion; provided, however, that the state or a municipal commission may provide, by rule, that where it is necessary to break ties among eligibles having the same final examination ratings in order to determine their respective standings on the eligible list, appointment or promotion may be made by the selection of any eligible whose final examination rating is equal to or higher than the final examination rating of the third highest standing eligible willing to accept such appointment or promotion. Appointments and promotions shall be made from the eligible list most nearly appropriate for the position to be filled.

2. Prohibition against out-of-title work. No person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless he has been duly appointed, promoted, transferred or reinstated to such position in accordance with the provisions of this chapter and the rules prescribed thereunder. No credit shall be granted in a promotion examination for out-of-title work.

L.1958, c. 790, § 1.

Historical Note

Derivation. Civil Service Law of 1909, c. 15, § 14, subd. 8, added by L.1918, c. 70, and amended by L.1953, c. 19, § 10, and repealed by L.1958, c. 790, § 1. Said section 14 was from a prior section 14, as amended L.1911, c. 547; L.1939, c. 767, § 2; L.1939, c. 799; L.1941, cc. 586, 630; L.1944, c. 376; L.1944, c. 704, § 2. Said prior section 14 derived from Civil Service Law of 1899, c. 370, § 13.

Memorandum on 1958 Revision. "The bill [subd. 1 of this section] incorporates the so-called one-cut-of-three rule into the statute, but provides, however, that the State Commission or any municipal civil service commission may provide by rule that where it is necessary to break ties among eligibles having the same final examination ratings in order to determine their respective standings on the eligible list, appointment or promotion may be made by the selection of any eligible whose final examination rating is equal to or high-

Appendix "A"